United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-6095

To be argued by
TOBIAS WEISS

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

LOUIS D. DEBERADINIS, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

REPLY BRIEF FOR APPELLANT

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This reply brief is concerned only with certain salient matters in the Government's Brief. Response in this reply brief is not made to everything that appears in the Government's Brief, and defendant does not intend thereby to indicate agreement with positions or statements of the Government. Defendant continues to rely on the contents of his brief filed heretofore.

I. On the Record Herein, the Assessment of $34,055.59 Was for the Entire Second Quarter of 1959. The Government Should be Barred from Making a Contrary Claim, Because of Its Failure to Make It in Response to Defendant's Interrogatories.

(a) It is to be noted, first, that the description of and references to the evidence in Defendant's Brief, regarding the period for which the assessment of $34,055.59 was

made against DeBeradinis, particularly as set forth at pages 16 and 17 of Defendant's Brief, is not disputed at all in the Government's Brief. There is nothing at all in the record herein to show an IRS determination that the $34,055.59 was assessed against DeBeradinis for a period ended May 21, 1959. That is admitted by the Government. The trial court attempted to support its finding to that effect by certain references to the record, but, as shown at p. 17 of Defendant's Brief, those references do not support but rather contradict the trial court's finding. What the record contains clearly does not support, and in fact contradicts, the present claim of the Government that the $34,055.59 was assessed for a period ended May 21, 1959.

(b) The period for which IRS *assessed* the amount of $34,055.59, is stated by the Government itself in par. 7 of the complaint filed herein by the Government. The complaint clearly states (p. 28a of printed appendix) in par. 7 that IRS made a 100% penalty *assessment* against DeBeradinis in part as follows:

> "Second Quarter 1959
> $34,055.59"

That is the *assessment* made by IRS, as asserted by the Government.

(c) The Government uses a burden-of-proof tactic in its brief in order to escape the record. The Government's position with respect to the burden of proof is invalid. The record shows the *assessment* made by IRS, as stated above and as uniformly supported by the evidence in the record. It isn't every utterance of any person who happens to be on a government payroll which puts a burden of proof on a taxpayer to prove the contrary. If there is a burden of proof on defendant in this case, it can only be with respect to an IRS determination by an authorized IRS official, such as an IRS assessment of tax liability.

Certainly, the mere statement of Government trial counsel or appellate counsel, or even of the trial court, does not put a burden of proof on defendant to prove the contrary. In this case, the only IRS assessment, as shown by the Government's own complaint and all other IRS actions in evidence, related to the entire second quarter of 1959 or to a quarter ended "6/30/59." If there is any evidence in the vast reaches of the Government to show a contrary or different IRS determination, and which would contradict the IRS assessment as shown in the Government's complaint herein, the burden was on the Government to come forward and prove it. There certainly was no burden of proof on the defendant, in these circumstances, to forage throughout the Government to find such contrary evidence. The proof shows an assessment for the entire second quarter; and the IRS ought to be able to show what it did, if that was otherwise than what it purported to do as shown by the evidence in this case.

That a taxpayer's burden of proof is limited and relates to determinations by or for the Commissioner of Internal Revenue, and even with respect to such determinations that the taxpayer's burden is not unlimited and thus the taxpayer has no burden to show the correct amount of tax, is established by *Helvering* v. *Taylor,* 293 U.S. 507 (1935).

(d) The Government's Brief, at p. 16, seeks to excuse the absence of any IRS determination referring to a period ending May 21, 1959, by stating that, in the case of an income tax deficiency by a calendar year taxpayer, the IRS notice of deficiency merely refers to the entire calendar year. However, there is no evidence in the record of any such practice, and certainly an assertion in a brief is no evidence and puts no burden of proof on the taxpayer. There is nothing to show, even if there were such a practice in regard to income taxes, that there is the same practice in regard to social security taxes and other taxes collected

on a quarterly basis. Moreover, the analogy is not valid. A closer comparison might concern a taxpayer of income tax on a calendar year who ceases to exist before the end of the calendar year, as for example where a taxpayer terminates after three months or some odd period during the calendar year. There is nothing at all in the record to show that the notice of deficiency in such a case nevertheless refers to a whole calendar year. Indeed, such a notice of deficiency would be inaccurate and misleading.

(e) Throughout the many years between 1959 and the time of trial herein, the Government never stated or even suggested that the assessment of $34,055.59 was for a period ended May 21, 1959. Even in response to the defendant's two sets of interrogatories, the Government never made that claim or presented the related information. How did the Government reduce defendant's liability so that it related to only a portion of the second quarter of 1959? What method was used? What was the relation between the liability that DeBeradinis would have had for the entire second quarter and the alleged reduced amount of $34,055.59? Throughout those years there was considerable contact between DeBeradinis and his attorney and the IRS, and the present claim was never made by anyone at IRS.

(f) Defendant served two sets of interrogatories on the Government to find out, in preparation for trial, the amount that was claimed by IRS from DeBeradinis and how it was determined (See Exs. T and U). Extracts from those exhibits, and the Government's answers, appear at pages 28a through 31a of the printed appendix herein. The Government never said in its response that the $34,055.59 was for a period less than the full quarter. The failure of the Government, in response to those interrogatories, to assert related facts or make the claim it now asserts (regarding the $34,055.59 being only for a period

ending May 21, 1959) was misleading to defendant, and the failure of that disclosure should bar the Government from making that claim now.

II. The Blanket Denial of Defendant's Motion for Summary Judgment was an Improper Disposition under FRCP 56 in the Circumstances Here Involved.

(a) The Government, in its brief, does not dispute the statement, at p. 8 of Defendant's Brief, that the Government did not file anything in opposition to defendant's motion for summary judgment under FRCP 56.

(b) The provisions of FRCP 56 therefore indicate that judgment should have been rendered for defendant, or at least that the court should have made a finding of uncontroverted facts for purposes of an ensuing trial. There is no indication, however, that the court even made an attempt to ascertain such uncontroverted facts. The reasons given by the court for sweeping aside the extensive material presented by defendant, much of it being from court records or Government sources and even from the IRS, are not supported by the record or by the cases cited by the court, as discussed at pp. 11 through 14 of Defendant's Brief. No part of that discussion, or of the authorities presented at pp. 9 through 11 of Defendant's Brief, is refuted by the Government.

(c) The principal claim made by the Government to support the lower court's blanket denial, without more, of defendant's motion for summary judgment, is that the evidence presented by defendant was not "credible."

First, the opinion of the lower court, on the motion for summary judgment, nowhere says that the uncontroverted evidence was not "credible," and the reason for not making

such a finding is discussed next. The lower court only said that the uncontroverted evidence was "conclusory," and the invalidity of that assertion has been discussed at pp. 12 and 13 of Defendant's Brief herein.

Secondly, there is good reason as to why the lower court did not rely on "credibility" as a ground for its blanket denial of summary judgment. That reason is that "credibility" was not significantly involved because of the nature of the extensive supporting evidence and the exhibits offered to support the motion. Those exhibits were documents obtained from IRS and involved IRS action; or consisted of testimony of an Assistant Chief of Collection in the IRS District Director's office; or involved an opinion of the Superior Court of Connecticut or records on file in the state courts of Connecticut or in the federal courts; or involved records on file with the Interstate Commerce Commission and which came into existence in circumstances entirely independent of any tax considerations; or consisted of documents made by contracting parties with adverse interests. The record herein, which contains those exhibits, substantiates the foregoing. In addition there were the interrogatories and the Government's answers thereto, and the Government's complaint. There was no question of "credibility" which prevented application of the rules of FRCP 56, which the Government completely ignored; and under those rules the motion for summary judgment should have been granted or at least the uncontroverted facts should have been found for purposes of trial.

Thirdly, if "credibility" was an issue before the lower court, why didn't the Government contest "credibility" by filing something in opposition under FRCP 56? At the very least, the Government could have presented an opposing affidavit. Instead, there is nothing in the record to show that "credibility" was challenged before the lower court. To permit blanket denial of summary judgment

in circumstances of this case is to read FRCP 56 out of the federal rules. Certainly it is to be expected that there will not be a dual standard which is lax for the Government and strict for taxpayers.

(d) Typical of the difference between the present case and the cases cited in the Government's brief on this issue, is *Cross* v. *U. S.*, 336 F. 2d 431 (C.A. 2, 1964), on which the Government places heavy reliance. That difference is twofold: (1) The present case involves extensive, detailed, objective evidence, which was absent in support of the motion for summary judgment in the *Cross* case. In that case only affidavits, without supporting evidence, were presented by the moving party. (2) The record on appeal in the *Cross* case discloses that an affidavit in opposition to the motion for summary judgment was filed by Assistant U. S. Attorney Clarence M. Dunnaville, whereas in the present case nothing was filed in opposition under FRCP 56. In the *Cross* case there was a contest of affidavits, whereas in the preesnt case there was extensive, detailed supporting evidence which was left uncontested.

(e) "Credibility" is no magical incantation, either to excuse any omission or deviation by the Government or to enable a court to avoid the obligations imposed by FRCP 56. In view of the evidence presented in support of the motion herein, and in view of the complete default in response by the Government, the discretion of the court to simply deny the motion ought to be limited. In such event, the lower court ought at least to state what it finds not to be "credible" and why it is not carrying out the normal dictates of FRCP 56, instead of resorting to generalities which might suffice where its discretion is much broader and unrestricted by provisions such as FRCP 56. It is respectfully submitted that it is not a valid answer, to support a blanket denial and disregard of FRCP 56 in the

circumstances of this case, to simply say that all of untroverted evidence was not "credible."

(d) Since the affidavits and supporting exhibits are in the record before this court, defendant has not reviewed them in detail in his brief. This court will undoubtedly read those affidavits and supporting exhibits, and such an examination will show that they are detailed and extensive, with numerous exhibits from objective sources, and that a response by the Government was called for under FRCP 56.

III. With Respect to the Refusal of IRS to Act, None of the Cases on Which the Government Relies in its Brief Have Facts Comparable to Those in the Present Case.

(a) The evidence in the present case, much of it from IRS sources, shows the following:

1. DeBeradinis made an agreement with IRS for payment of the delinquent taxes by McFaddin on a monthly basis. See Ex. C, a certified copy of a letter agreement approved by an IRS collection officer.

2. As long as DeBeradinis was in control of McFaddin, that letter agreement was observed and the payments thereunder were made (Tr. 61-62). The Government does not contend otherwise.

3. Payment of the McFaddin taxes was involved in the transaction between DeBeradinis and Adley. With respect to DeBeradinis turning over control of McFaddin to Adley, the latter represented to DeBeradinis (see first page of the management contract, Ex. A1) that Adley was

> "ready, willing and able * * * to provide the necessary capital, equipment, terminals and other facilities necessary to preserve McFaddin as a going concern and

> to assure its future usefulness in the performance of adequate and continuous service to the public * * *"

To fulfill that representation, it was necessary to satisfy creditors of McFaddin, one of whom was the United States for the delinquent taxes (Tr. 56-57).

4. The payment of the delinquent McFaddin taxes was expressly involved in the arrangement made by DeBeradinis with Adley. And, with respect to the delinquent taxes, IRS participated in the arrangement. Thus, with respect to the delinquent taxes, there was a meeting with several collection officials of the Internal Revenue Service, at which DeBeradinis and an Adley officer were present, and at which Adley through a vice-president agreed that the delinquent McFaddin taxes would be paid to IRS (Tr. 63-68; Ex. E and Ex. F).

(Ex. E is a transcript of testimony of Michael D'Ambrosio, who, in 1959, was the Assistant Chief of the delinquent accounts branch of the District Director's Office at Hartford. He describes a meeting at the Adley office at New Haven, Connecticut, at which he and two other Internal Revenue officials, Mr. Kennedy and Mr. Beach, were present, and at which the vice-president and general counsel of Adley was present. At that meeting, Mr. Simons, the Adley officer and general counsel, told the Internal Revenue officials that Adley

> "would continue the arrangement that we had with McFaddin to pay $3,000 a month for—I don't know how many months—it was just a few months, and then the payments would increase to $3,500 a month."

Ex. F is further testimony of Mr. D'Ambrosio, on cross-examination by Adley counsel, in which he confirmed that "Adley would see to it that we got our payments each month.")

5. From the foregoing, it is clear that IRS was informed of the shift of McFaddin from DeBeradinis to

Adley, and IRS participated in, and agreed to, Adley's undertaking to pay the delinquent taxes in place of DeBeradinis.

6. In fact, Adley made several payments to Internal Revenue on Adley's commitment to continue paying the delinquent McFaddin taxes (Ex. E, testimony of Assistant Chief of delinquent accounts Michael D'Ambrosio; Ex. D, a letter by Revenue Officer Beach to Adley).

7. However, after making several payments as aforesaid, Adley stopped the payments on the delinquent McFaddin taxes and refused to make any further payments on the McFaddin taxes (Ex. D, which is a letter from Internal Revenue Officer Beach to Adley about Adley's default on its commitment, and showing that Adley's last payment on the delinquent McFaddin taxes was for July 1959).

8. The Internal Revenue Service knew, in the Spring and Summer of 1959, that Adley had taken over the management and operation of the McFaddin business and its assets (Tr. 63; Exs. D, E and F. That is shown by the testimony of Assistant Chief D'Ambrosio and by the letter of Revenue Officer Beach).

9. The Internal Revenue Service also knew that Adley defaulted on its commitment to pay the delinquent McFaddin taxes, and that Adley failed and refused to make any payments, or even to use McFaddin assets to make any such payments, after July 1959 (Ex. D, being a letter by Revenue Officer Beach on that very subject, written at the time of Adley's default; Exs. D and E).

(b) In view of the foregoing facts, and particularly the participation in and arrangements made by IRS, the IRS, which was fully informed, should have taken action against the McFaddin assets when Adley defaulted on its undertaking to IRS and made a wholesale appropriation of

McFaddin's assets with U. S. tax liens on them. DeBeradinis relied on those arrangements made by IRS, and Adley's undertaking to pay the taxes was a principal reason for disposing of the substantial McFaddin business to Adley. Throughout this period, DeBeradinis pleaded with IRS to take collection action against the McFaddin assets in view of Adley's default to IRS (Tr. 126-128, 132-138; p. 1 of Ex. 6). In view of these facts, and in view of the arrangements made by IRS, and bearing in mind the discussion in Defendant's Brief at pp. 19 through 23, it is not proper to place the penalty on DeBeradinis because of the delinquency of IRS.

(c) None of the cases, on which the Government relies, involved facts such as the foregoing.

IV. The $72,640 Recovered by DeBeradinis in His Litigation Against Adley Was Entirely the Result of the Efforts of DeBeradinis.

(a) The many years of litigation against Adley, and the various lawsuits and courts in which that litigation was conducted, are detailed in par. 4 of Ex. Y. DeBeradinis retained counsel and was responsible for instituting and maintaining that litigation.

(b) DeBeradinis was the backbone of the litigation against Adley, with his work and in obtaining funds for expenses which had to be incurred during the course of those various lawsuits over a period of about ten years. The Government never paid any of those expenses. DeBeradinis was never paid for that work or reimbursed for those expenses. See the testimony at Tr. 121-122.

(c) The Government has stipulated on the record that "the United States played no part at all" in the Adley litigation. See Tr. 195-196.

(d) The Government's Brief, at p. 29, states that counsel for McFaddin in the Adley litigation received a contingency fee which was paid out of the recovery against Adley. However, that very recovery was achieved only because of the effort of DeBeradinis and funds obtained by him. In litigation which went to the Court of Appeals twice, and on petition for certiorari to the Supreme Court twice, and went on appeal to the Connecticut Supreme Court twice, and which was maintained in two state courts in Connecticut (see Ex. Y), there had to be substantial expense. The Government did not pay any of that expense, either initially or ultimately, and without funds obtained by DeBeradiris, that litigation could not be maintained. That is in addition to the thousands of hours of work contributed by DeBeradinis, without which the litigation could neither be maintained nor brought to a successful conclusion (for the Government's benefit). Indeed, that litigation was maintained against overwhelming odds, not the least of which was caused by the resistance of IRS (see pars. 5, 6 and 7 of Ex. Y). In these circumstances, DeBeradinis should receive the benefit of that recovery.

CONCLUSION

The judgment below should be reversed, in accordance with the relief heretofore requested.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff--Appellee,

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LOUIS D. De BERADINIS, JR.,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on December 30, 1975, she served 3 copies of Reply Brief for Appellant

on

Chief of Appellate Section,
Tax Division,
Department of Justice,
Washington, D. C. 20530

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
30th day of December, 1975

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30 0932350
Qualified in Nassau County
Commission Expires March 30, 1977